STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

No. 128340

vs.

KENNETH JAY HOULIHAN
Defendant-Appellant.

Lower Court No. 01-02731-FC
COA No. 256534

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Question

I.

A "new rule" of constitutional procedure is retroactively applicable on collateral attack when it is of the sort where the absence of its application at the proceeding establishing guilt seriously diminishes the likelihood of an accurate determination of guilt. The rule of *Halbert v Michigan* is an extension of *Douglas v California* not *Gideon v Wainwright*, and is not concerned with the guiding hand of counsel at the "main event." Is *Halbert* is retroactively applicable on collateral attack?

Amicus answers: "NO"

Statement of Facts

Amicus joins in the Statement of Facts of the appellant, the People of the State of Michigan, whom amicus supports.

Argument

I.

A "new rule" of constitutional procedure is retroactively applicable on collateral attack when it is of the sort where the absence of its application at the proceeding establishing guilt seriously diminishes the likelihood of an accurate determination of guilt. The rule of *Halbert v Michigan* is an extension of *Douglas v California* not *Gideon v Wainwright*, and is not concerned with the guiding hand of counsel at the "main event." *Halbert* is not retroactively applicable on collateral attack.

A. Factual and Procedural Setting of the Case

The defendant here accepted a plea agreement that included the dismissal of counts and another entire case, saying (under oath) that no other promises had been made. He requested the appointment of counsel to assist in preparation of an application for leave to appeal, and the request was denied by the trial court. His application for leave was denied, and an application for leave to this court was denied. He then filed a motion for relief from judgment raising two issues; he did not request counsel until filing for leave after the trial court denied the motion, when he then requested the Court of Appeals to remand for the appointment of counsel, which that court denied. He applied for leave to this court on March 31, 2005, and the *Halbert* decision was rendered by the United States Supreme Court on June 23, 2005, leading to this court's order regarding the applicability of that decision in this case.[1]

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[1] "The parties are directed to file supplemental briefs by October 24, 2005, addressing whether the holding in *Halbert v Michigan,* 545 US ___; 125 S Ct 2582; 162 L Ed 2d 552 (2005), retroactively applies to defendant's motion for relief from judgment from his plea-based conviction where the trial court denied his request for the appointment of appellate counsel to assist him in pursuing a direct appeal. In addressing this issue, the parties may benefit from considering *Teague v Lane*, 489 US 288, 356; 109 S Ct 1060; 103 L Ed 2d 334 (1989), *Beard v Banks*, 542 US 406; 124 S Ct 2504; 159 L Ed 2d

Here, then, the defendant preserved on direct appeal his claim (though defendant did not raise the counsel issue on appeal, amicus would take the view that the request for counsel by defendant was sufficient to preserve the issue). The direct appeal, however, had concluded by the time *Halbert* was decided, which was not decided until the application for leave to appeal from the Court of Appeals' denial of leave from denial of the motion for relief from judgment was pending in this court.

B. The Analytical Framework: Four Faces of Retroactivity

That which makes an overruling decision retroactive is its application to conduct or events occurring *before* the decision. That which creates levels or degrees of retroactivity is that courts sometimes do not apply an overruling decision at all to conduct or events occurring before the decision, including that conduct or event involved in the very case resulting in the overruling decision itself; sometimes apply the decision only to that conduct or those events occurring before the decision litigated in the very case announcing the decision; sometimes apply the decision to that conduct or those events occurring before the decision where an adjudication on direct review has not yet been completed and the question has been properly raised; and sometimes apply the decision to that conduct or those events occurring before the decision even when adjudication on direct review has been completed, allowing the judgment rendered to be attacked collaterally.[2]

Both the cases and the literature in the field tend to use terms such as "prospective," "fully prospective," "partially prospective," "retroactive," and "fully retroactive" without precision, so that

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494 (2004), and *Howard v United States*, 374 F3d 1068 (CA 11, 2004)." Order of 9-23-2005.

[2] One could view the question as one of the level of specificity, or, on the other hand, the level of generality, that application of the new rule is to have. See Shannon, "The Retroactive and Prospective Application of Judicial Decisions," 26 Harv J L & Pub. Pol'y 811, 812 (2003).

what is defined by some cases or commentators as "full retroactivity" is described by others as "partial retroactivity." One court has defined the terms in this manner:

- *Purely prospective*: a new rule or overruling decision is not applied even to the parties to the case in which the rule or overruling is announced, but applies only to future events;

- *Prospective*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, but to no others, including pending cases with the issue preserved, applying only, besides the parties, to future events.

- *Retroactive*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, and to all other cases then pending on direct review where the issue is preserved; and

- *Fully retroactive*: a new rule or overruling decision is applied not only to the parties to the case in which the new rule or overruled is announced and all other cases then pending on direct review where the issue is preserved, but also after the direct review is over where asserted by way of collateral proceedings.[3]

Though this description of what might be termed the "four faces of retroactivity" is both accurate and useful, some adjustment of the nomenclature is required; it is confusing to refer to one application of an overruling decision as "prospective" if there is also an application that is "purely prospective." If there is a greater degree of prospectivity than "prospective" then the lesser degree is more sensibly known as "partial prospectivity."[4] The differences in the opportunity for review between civil and criminal cases also require some adjustment. Once direct review is completed in a civil case, a

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[3] *Blackwell v Commonweal, State Ethics, Comm'n*, 589 A2d 1094, 1103 (PA, 1991) (Justice Zappala concurring); see also *PNC Bank v Workers' Compensation Appeal Board*, 831 A2d 1269, 1282-1283 (Commonwealth Ct, 2003).

[4] A rule of partial prospectivity is also necessarily one of partial retroactivity, applying to some conduct or events that occurred prior to the overruling decision, but in the scheme of things is more usefully referred to as partially prospective.

collateral attack on the judgment is virtually impossible, save for fraud,[5] and thus to use the term "partially retroactive" to refer to those decisions applicable to the parties to the case in which the rule or overruling is announced, and to all other cases then pending on direct review where the issue is preserved, makes no sense in civil cases, for in civil cases this is "full" retroactivity. In criminal cases, collateral attack is more generally available through such mechanisms as state post-conviction proceedings—in Michigan, the motion for relief from judgment—and federal habeas corpus review, though the grounds for relief are far narrower than on direct review, as are the circumstances when a new rule or overruling decision applies. It is more sensible to call overruling decisions that are applicable to the parties and to those cases pending on appeal where the issue has been preserved "fully retroactive," so to have a consistent terminology with civil and criminal cases, and to have a separate category of retroactivity for criminal cases where an overruling decision is applicable even on collateral attack. And indeed, federal decisions refer to this sort of retroactivity as "retroactive on collateral attack" or "retroactive to cases on collateral review."[6]

The four faces of retroactivity are thus described here as follows:

- *Purely prospective*: a new rule or overruling decision is not even applied to the parties to the case in which the rule or overruling is announced, but applies only to future events;

- *Partially Prospective*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, but to no others, including pending cases with the issue preserved, applying only, besides the parties, to future events.

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[5] See e.g. *Matter of Bulic*, 997 F2d 299 (CA 7, 1993); *Rogoski v Muskegon*, 107 Mich App. 730, 736, (1981).

[6] See e.g. *Bottone v United States*, 350 F3d 59 (CA 2, 2003).

- *Fully Retroactive*: a new rule or overruling decision is applied to the parties to the case in which the rule or overruling is announced, and to all other cases then pending on direct review where the issue is preserved; and

- *Retroactive on Collateral Attack*: a new rule or overruling decision is applied not only to the parties to the case in which the new rule or overruled is announced and all other cases then pending on direct review where the issue is preserved, but also after the direct review is over where asserted by way of collateral proceedings.

C. Retroactivity on Collateral Attack

(1) United States Supreme Court Authority Governs the Inquiry

Michigan law on retroactivity is not entirely coherent.[7] But this case involves a retroactivity question concerning a decision of the United States Supreme Court premised on the United States Constitution. Principles of retroactivity established by that Court thus govern the inquiry here.

The entire notion of retroactivity is a "relative newcomer"[8] to American jurisprudence, the notion that an overruling construction of a statute (or other source of law) would *not* apply to actions

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[7] Several years ago, for example, this court, overruling prior decisions, held that Michigan's statutory governmental immunity from tort liability contains no exception for a "trespass-nuisance" action. *Pohutski v City of Allen Park*, 465 Mich. 675 (2002). By law—the statute—the municipalities sued for damages on a trespass-nuisance theory were entitled to dismissal of the lawsuit and avoidance of damages. But this was not the result of the case. Instead the court held its decision to be prospective only, and remanded for reconsideration of the motions for summary judgment under the overruled case law, and for trial if necessary, subjecting the municipalities involved to suit and to possible damages that, under the court's holding, the statute prohibited. On the other hand, the court later overruled precedent allowing use of the state's power of eminent domain to take private property and provide it to a private entity on the theory that a "better" use of the property, benefitting the public, would thereby be made. *County of Wayne v Hathcock*, 471 Mich 445 (2004). This time the decision was held applicable to the parties, so that the County of Wayne was unable to condemn the properties in question and their owners were thus able to keep them, and also to all pending cases where the issue had been preserved properly. Indeed, the court stated that "that there is a serious question as to whether it is legitimate ... to render purely prospective opinions [precisely what it had done in *Pohutski* two years earlier], as such rulings are, in essence, advisory opinions." On the criminal side, the court in *People v Cornell*, 466 Mich 335 (2002), overruling previous decisions, held that under statute an offense is included within another only when it is a subset of the elements of the greater offense, and applied the decision to the parties and to all cases pending on appeal with the issue preserved. But only a half-dozen years earlier the court, though holding that the new trial statute does not permit a trial judge to act as "13th juror," second-guessing the credibility determinations of the jury, and overruling authority to the contrary, applied that decision purely prospectively, not even in the case at hand. *People v. Lemmon,* 456 Mich. 625, 642-642 (1998). The granting of a new trial on "13th juror" grounds, though improper under statute (as the court had just ruled), was thus upheld. There is no rationale that can reconcile these decisions.

[8] Roosevelt, "A Little Theory Is A Dangerous Thing: The Myth of Adjudicative Retroactivity," 31 Conn L Rev 1075, 1082 (1999).

that occurred before the overruling decision simply not existing.[9] It was the sea change in constitutional jurisprudence worked by the Warren Court that virtually demanded limitation of the effects of that Court's many overruling decisions,[10] and thus consideration of a doctrine of retroactivity. In part because the purpose of the exclusionary rule is to deter unlawful police conduct, a purpose that cannot be served when the conduct condemned occurs before it is declared improper, the Court limited the reach of *Mapp v Ohio*[11] in *Linkletter v Walker*[12] regarding habeas proceedings, limited its reach on direct appeal in *Johnson v New Jersey*,[13] and continued on to limit other new rules of criminal procedure to preclude their application to conduct occurring before the Court's overruling construction of the Constitution.[14]

The test developed by the United States Supreme Court—since repudiated by that Court—applied three factors:

- the purpose of the new rule;
- the general reliance on the old rule; and
- the effect of retroactive application of the new rule on the administration of justice.

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[9] "Judicial decisions have had retrospective operation for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 US 349, 372, 30 S Ct 140, 148, 54 L Ed 228 (1910) (Holmes, J., dissenting).

[10] "The list of opinions destroyed by the Warren Court reads like a table of contents from an old constitutional law casebook." Philip B. Kurland, *Politics, the Constitution, and the Warren Court,* 90-91 (1970).

[11] *Mapp v. Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961).

[12] *Linkletter v. Walker*, 381 US 618, 85 S Ct 1731, 14 L Ed 2d 601 (1965).

[13] *Johnson v. New Jersey*, 384 US 719, 732, 86 S Ct 1772, 16 L Ed2d 882 (1966).

[14] See discussion in *Griffin v. Kentucky*, 479 US 314, 321, 107 S Ct 708, 93 L Ed 2d 649 (1987).

But because a construction of a statute or constitutional provision, even one overruling prior precedent, is considered an expression of what the law "is," this three-prong retroactivity test has been abrogated by the United States Supreme Court in favor of Justice Harlan's view that these overruling decisions are applicable on direct appeal to the case before the court and all cases then pending on appeal with the issue preserved (what is here termed "fully retroactive").[15] As to decisions final at the time of the overruling decision, in the criminal arena, where collateral attack is possible, an overruling decision will be applicable on collateral attack only in very limited circumstances, the Court adopting, with some modification, Justice Harlan's view on this point as well. A new rule will be applied retroactively on collateral attack if it

- places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or
- announces a new watershed rule of criminal procedure necessary to the fundamental fairness of the criminal proceeding.[16]

(2) Direct Review Ended Long Ago Here

Though defendant preserved his claim on direct review, direct review ended in this case before the decision in *Halbert*. That decision was rendered June 23, 2005, and defendant's application for leave to appeal to this court after the Court of Appeals denied leave to appeal was denied on February 20, 2003. "State convictions are final 'for purposes of retroactivity analysis

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[15] *Griffith v Kentucky*, 479 US 314, 322-23.

[16] *Teague v. Lane,* 489 US 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989).

when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely petition has been finally denied.'"[17]

(3) *Halbert* Falls Within Neither of the Exceptions to the Bar on Retroactivity on Collateral Attack

The limitation on retroactive application apply to "new rules." *Halbert* is plainly a new constitutional rule. A constitutional rule is "new" when it is not "*dictated* by precedent existing at the time the defendant's conviction became final."[18] This principle "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions...."[19] It was on this basis that the United States Supreme Court held *Arizona v Roberson*[20] to be inapplicable on collateral attack:

> ...the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes deciding whether the current decision is a 'new rule'....Courts frequently view their decisions as being 'controlled by' or 'governed' by prior opinions even when aware of reasonable contrary conclusions reached by other courts....That the outcome in *Roberson* was susceptible to debate among reasonable minds is evidence further by the differing positions taken by the judges of the Courts of Appeals....It would not have been an illogical or even a grudging application of *Edwards* to decide that it did not extent to the facts of *Roberson*. We hold, therefore that *Roberson* announced a 'new rule.'[21]

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[17] *Beard v Banks*, 542 US 406, 124 S Ct 2504, 2510, 150 L Ed 2d 2004 (2004), quoting *Casperi v Bohlen*, 510 US 383, 390, 114 S Ct 948, 953, 127 L Ed 2d 236 (1994).

[18] *Butler v McKellar*, 494 US a407, 412, 110 S Ct 1212, 1216, 108 L Fed 2d 347 (1990), quoting *Teague*, 109 S Ct at 1070, with emphasis in the original).

[19] Id.

[20] *Arizona v Roberson*, 486 US 675, 108 S Ct 2093, 100 L Ed 2d 704 (1988).

[21] *McKellar*, 110 S Ct at 1217.

The ultimate holding of *Halbert* was not "then apparent to all reasonable jurists."[22] Even the decision itself observes at the outset that the case involved which of two cases provided the appropriate framework for decision: "Petitioner Halbert's case is framed by two prior decisions of this Court concerning state-funded appellate counsel, *Douglas* and *Ross*. The question before us is essentially one of classification: With which of those decisions should the instant case be aligned?"[23] A majority of this court reached an opposite conclusion from that ultimately reached by the United States Supreme Court, and three of the members of that Court viewed the matter differently than did the majority. The "outcome was susceptible to debate among reasonable minds," and thus *Halbert* announces a new rule.

That new rule does not fall within either of the exceptions to the ordinary bar on retroactive application of a new rule on collateral attack. There is no question that the rule of *Halbert* does not place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." The issue is whether it "announces a new watershed rule of criminal procedure necessary to the fundamental fairness of the criminal proceeding." Decisions have further delineated what is meant by this exception; it goes to the reliability of those procedures which determine *guilt or innocence*. The United States Supreme Court has said:

> New rules of procedure...generally do not apply retroactively. They...merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding....*That a new procedural rule is 'fundamental'*

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[22] *Beard, supra*, 124 S Ct at 2511.

[23] *Halbert*, 125 S Ct at ___.

> *in some abstract sense is not enough*; the rule must be one 'without which *the likelihood of an accurate conviction is serious diminished*....This class of rules is extremely narrow, and *it is unlikely that any...has yet to emerge*.[24]

Halbert goes not at all to the procedure by which guilt is determined—the plea process—at which defendant enjoyed the right to counsel and careful procedures designed to secure knowing and intelligent waivers of those rights incident to the trial process, or the sentencing process, again where defendant was represented by counsel and careful procedures were followed. The case has nothing to do with the plea proceeding—which, like its counterpart, the trial, is the "main event" of the criminal process—being concerned then with a procedure, appeal, which the state has no obligation to provide at all.[25] Though the right to counsel is involved, it is not the 6th Amendment right to counsel secured for indigent defendants for the "main event," be it a trial or plea, at which guilt or innocence is litigated, it is the right to counsel newly announced by *Halbert*, its source in the Constitution remaining unclear.[26] But whatever its constitutional footing, the right involved is not akin to the 6th Amendment right protected for indigents by *Gideon*,[27] and fundamental to the

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[24] *Schriro v Summerlin*, 542 US 348, 124 S Ct 2519, 2523, 159 L Ed 2d 542 (2004)(emphasis supplied).

[25] As *Halbert* itself reaffirms.

[26] As noted by Justice Thomas in dissent, the majority decision failed "to ground its analysis in any particular provision of the Constitution or in the Court's precedents....Instead, the majority pins its hopes on a single case: *Douglas*...." *Halbert*, 125 S Ct at ___.

[27] *Gideon v Wainwright*, 372 U.S. 335, 83 S Ct 792, 9 L.Ed.2d 799 (1963).

"likelihood of an accurate conviction" by protecting in some fashion the proceeding at which guilt is established.[28]

Howard v United States,[29] mentioned in this court's order, is consistent with this analysis. In *Argersinger v. Hamlin*[30] it was held that defense counsel must be appointed in any criminal prosecution "whether classified as petty, misdemeanor, or felony....that actually leads to imprisonment even for a brief period."[31] And in *Scott v. Illinois*[32] the Court made plain that counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment. The question in *Shelton v Alabama*[33] was the applicability of these cases in a slightly different situation; that is, where the defendant is not initially incarcerated but given a suspended sentence of incarceration which "resurrects" upon a named condition (such as violation of probation). Because Shelton had been sentenced to a period of incarceration though he had not actually been incarcerated at that time, and because that period could commence upon the occurrence of certain conditions, the Supreme Court found *Argersinger* applicable. The rationale in that case that at the "main event"—the proceeding at which guilt or innocence was determined—defendant needed "the guiding hand of counsel" was applicable.

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[28] Compare *Schardt v Payne*, 414 F.3d 1025 (CA 9, 2005)(*Blakely v Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004) not retroactive on collateral attack); *Murillo v Frank*, 402 F.3d 786 (CA 7, 2005)(*Crawford v Washington*, 541 US 36, 124 S Ct 1354, 158 L Ed 2d 177 (2004) not retroactive on collateral attack).

[29] *Howard v United States*, 374 F.3d 1068 (CA 11, 2004).

[30] *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

[31] 92 S.Ct. at2006.

[32] *Scott v. Illinois,* 440 U.S. 367, 373-374, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979)

[33] *Alabama v. Shelton,* 535 U.S. 654, 658, 122 S.Ct. 1764, 1767 (2002).

Because, then, *Shelton* concerns the assistance of counsel at the proceeding at which guilt or innocence is determined, *Howard* found it retroactive on collateral attack. The 11th circuit agreed that the rule announced in *Shelton* was a "new rule," but found it retroactive on collateral attack because "[e]very extension of the right to counsel from *Gideon* through *Argersinger* has been applied retroactively to collateral proceedings by the Supreme Court."[34] But the rule announced in *Halbert* is *not* an extension of *Gideon*, concerned with the proceeding at which guilt or innocence is determined, and with the right to counsel guaranteed by the 6th Amendment, it is instead an extension of *Douglas*, applicable to a proceeding—appeal—which the state need not provide at all. *Howard* by implication supports the view that *Halbert* is not retroactive on collateral attack.

D. Conclusion

Amicus believes the following conclusions regarding retroactivity and *Halbert* are correct:

- *Halbert is Fully Retroactive*: the decision applies to the parties to the case in which the rule or overruling is announced, and to all other cases then pending on direct review where the issue is preserved. That retroactivity on direct review turns on preservation is well established in the cases.[35] Had the instant case been pending on direct

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[34] 374 F.3d at 1077.

[35] *United States v. Levy*, __F3d__, 2005 WL 1620719, 4 (CA11, 2005))"[r]etroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved"); *United States v. Verbitskaya*, 406 F.3d 1324, 1340 (CA 11, 2005)("The *Griffith* holding, however, applies only to defendants who preserved their objections throughout the trial and appeals process"). *Crawford* is not excepted from this principle. See e.g. *People v. Morel*, 798 N.Y.S.2d 315, 318 (2005)("Defendant's claim based on *Crawford v. Washington*... is not preserved for appellate review. ...While *Crawford* has been accorded retroactive application to all cases whose appeals remained pending as of the decision date ...the issue is preserved by appropriate objection under state law preservation rules...which, in the case of Confrontation Clause claims, must be articulated with the requisite reference to the Federal Constitutional right"); *State v Gomez*, __SW3d__, 2005 WL 1616186 (Tenn., 2005) ("At first glance...*Griffith* would seem to require us to apply the *Crawford* rule in this appeal....Closer analysis reveals, however, that *Griffith* mandates plenary retroactive application of new rules to cases pending on direct review only if a defendant has timely raised and properly preserved the issue to which the new rule relates").

review at the time of decision of *Halbert* it would have been applicable here, as defendant preserved the issue. The case should apply to all cases brought within the time for filing an application (currently 1 year) where a request for counsel was or is made.

- *Retroactive on Collateral Attack*: *Halbert* is not retroactive on collateral attack; it is inapplicable on a motion for relief from judgment, then, as it concerns a new rule that is not retroactively applicable when raised after conclusion of the direct appeal.

Relief

WHEREFORE, amicus requests that the convictions be affirmed or leave denied.

Respectfully submitted,

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President
Prosecuting Attorneys Association of Michigan

KYM L. WORTHY
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TIMOTHY A. BAUGHMAN
Chief of Research,
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STATE OF MICHIGAN
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THE PEOPLE OF STATE OF MICHIGAN,

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Third Circuit Court No. 01-02731-FC
Court of Appeals No. 256534

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE)ss

The undersigned deponent, being duly sworn, deposes and says that she served a true copy of **Brief of the Prosecuting Attorney Association as Amicus Curiae in support of the People of the State of Michigan**

upon: Anne Tantus

the above named attorneys, by DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF DETROIT, enclosed in an envelope bearing postage fully prepaid, on October 31, 2005, plainly addressed as follows:

Anne Tantus
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645 Griswold, Ste. 3300
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82 Ionia Avenue, Ste. 450
Grand Rapids, MI 49503

JOYCELYN SHARP

said pleading was filed in the SUPREME COURT, by DEPOSITING SAID PLEADING IN THE U.S. MAIL IN THE CITY OF DETROIT, enclosed in an envelope bearing postage fully prepaid at the following address:

CORBIN R. DAVIS, Clerk
Michigan Supreme Court
P. O. Box 30052
Lansing, Michigan 48909

Subscribed and sworn to before me
this 31st day of October, 2005.

Notary Public, Wayne County, Michigan
My Commission Expires: 01-23-09